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IN THE
COURT OF APPEALS OF INDIANA

CHRISTOPHER RIDDLE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0701-CR-102
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Grant Hawkins, Judge
Cause No. 49G05-0603-FB-057572

September 21, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Christopher Riddle ("Riddle") appeals his conviction and sentence for unlawful possession of a firearm by a serious violent felon, including the ten-year habitual offender sentence enhancement imposed by the trial court. He argues that the stop and pat down search that led to the discovery of the firearm violated his rights under the Fourth Amendment to the United States Constitution and Article I, § 11 of the Indiana Constitution. He also contends that the trial court erred in enhancing his sentence under the general habitual offender statute by proof of the same felony used to establish that he is a serious violent felon. We conclude that the stop and subsequent pat down search were reasonable under the totality of the circumstances and therefore affirm Riddle's conviction. However, because of the Indiana Supreme Court's recent holding in *Mills v. State*, 868 N.E.2d 446, 452 (Ind. 2007), that "a defendant convicted of unlawful possession of a firearm by a serious violent felon may not have his or her sentence enhanced under the general habitual offender statute by proof of the same felony used to establish that the defendant was a 'serious violent felon,'" we must remand this cause to the trial court with instructions to vacate the habitual offender sentence enhancement.

Facts and Procedural History

At 3:15 a.m. on March 28, 2006, Indianapolis Police Department Officer Timothy Huddleston ("Officer Huddleston") was on patrol in the 4000 block of South Keystone Avenue, an area he regularly patrolled. As he passed by the Phillips 66 gas station at the corner of Keystone and Hanna Avenue, which was closed, he looked inside the drive-thru automatic car wash and noticed two black males. The car wash was completely dark, but

Officer Huddleston was able to see the two men because of the large lights in the gas station parking lot. As Officer Huddleston passed, the two men looked directly at his police vehicle and exited the car wash. They began to walk away, and Officer Huddleston turned his vehicle around to investigate further.

Officer Huddleston pulled into the parking lot where the two men were walking, exited his vehicle, and asked, "Hey, can I talk to you for a minute?" Appellant's App. p. 17. Both men approached Officer Huddleston's vehicle, and Officer Huddleston asked them to take their hands out of their pockets and to place them on the hood of his car. One of the men, later identified as Jimmie Miller ("Miller"), complied. The other man, later identified as Riddle, did not; rather, he simply stared at Officer Huddleston and "put his hands in the pockets of his coat." *Id*. After Officer Huddleston again "ordered" Riddle to place his hands on the car, Riddle initially complied. *Id*. However, after three seconds, Riddle took his hands off the car and "began looking over both his shoulders[.]" *Id*. Officer Huddleston "continued to order [Riddle] to keep his hands in plain view on the hood of [the] car until he again complied." *Id*. at 18.

Indianapolis Police Department Officer Chad Dailey ("Officer Dailey") arrived on the scene to assist Officer Huddleston. As Officer Huddleston attended to Miller, he informed Officer Dailey that Riddle was acting "squirrelly" and asked him to "check [Riddle] out." Tr. p. 6-7. Officer Dailey asked Riddle, "Do you have any weapons?" *Id*. Riddle responded, "No," *id*., but Officer Dailey patted him down and found a silver Jimenez Arms .380 caliber semiautomatic handgun. The officers then handcuffed Riddle and Miller. Officer Huddleston asked Riddle whether he had a permit to carry the gun,

and Riddle said no. As such, Officer Huddleston placed Riddle under arrest for carrying a handgun without a license. Upon further questioning, it was learned that Riddle had previous felony convictions for burglary and robbery.

On March 29, 2006, the State formally charged Riddle with Count I, Unlawful Possession of a Firearm by a Serious Violent Felon ("SVF"), a Class B felony, alleging as the underlying serious violent felony a 2003 conviction for robbery as a Class C felony,[1] and Count II, Carrying a Handgun Without a License, a Class A misdemeanor.[2] On May 19, 2006, the State charged Riddle with being a habitual offender, with the two prior unrelated felony convictions being the 2003 robbery conviction and a 1994 conviction for burglary as a Class B felony.[3]

Riddle filed a motion to suppress the evidence of his possession of a handgun, arguing that the stop and Officer Dailey's pat down search violated his rights under the Fourth Amendment to the United States Constitution and Article I, § 11 of the Indiana Constitution. After a hearing, the trial court denied the motion. On the day of the bench trial, Riddle asked the court to reconsider the motion to suppress. The trial court denied the motion again. The trial court incorporated the evidence from the two suppression hearings into the trial, and Riddle was found guilty on Counts I and II and found to be a

[1] Subsection (c) of Indiana Code § 35-47-4-5 provides: "A serious violent felon who knowingly or intentionally possesses a firearm commits unlawful possession of a firearm by a serious violent felon, a Class B felony." Under subsection (b), robbery is a "serious violent felony."

[2] Ind. Code §§ 35-47-2-1 & -23(c). Count II actually consisted of two parts: Part I alleged the basic offense of carrying a handgun without a license, a Class A misdemeanor, and Part II alleged that Riddle had been convicted of a felony within fifteen years before the date of the offense, which elevates the crime to a Class C felony. At trial, the State did not seek to prove Part II. *See* Tr. p. 82.

[3] Indiana Code § 35-50-2-8 provides that the State may generally "seek to have a person sentenced as a habitual offender for any felony by alleging, on a page separate from the rest of the charging instrument, that the person has accumulated two (2) prior unrelated felony convictions."

habitual offender. The trial court dismissed the carrying a handgun without a license charge due to double jeopardy concerns.

The trial court imposed a sentence of fifteen years for the SVF charge. Starting at the Class B felony advisory sentence of ten years, the court specifically added two years based on Riddle's 2005 conviction for possession of methamphetamine as a Class D felony and three years based on Riddle's 1994 conviction for burglary as a Class B felony. *See* Tr. p. 91-92. Furthermore, the trial court enhanced Riddle's sentence by ten years based on the habitual offender finding, for a total executed sentence of twenty-five years. Riddle now appeals.

Discussion and Decision

On appeal, Riddle contends that the trial court abused its discretion in admitting the evidence obtained as a result of the pat down search because the search violated his rights under the Fourth Amendment to the United States Constitution and Article I, § 11 of the Indiana Constitution. Riddle also maintains that the trial court erred in enhancing his sentence under the general habitual offender statute by proof of the same felony—the 2003 robbery conviction—used to establish that he is a serious violent felon.

I. Search

Riddle first argues that "[t]he trial court abused its discretion and committed reversible error by denying Riddle's motion for suppression of evidence seized incident to arrest after an illegal detention." Appellant's Br. p. 9. Although Riddle originally challenged the admission of the evidence through a pre-trial motion to suppress, he appeals following a completed bench trial and challenges the admission of such evidence

at trial. Thus, although Riddle states the issue as whether the trial court abused its discretion in denying his motion to suppress, "the issue is more appropriately framed as whether the trial court abused its discretion by admitting the evidence at trial." *Washington v. State*, 784 N.E.2d 584, 587 (Ind. Ct. App. 2003). Our standard of review for rulings on the admissibility of evidence is essentially the same whether the challenge is made by a pre-trial motion to suppress or by an objection at trial. *Ackerman v. State*, 774 N.E.2d 970, 974-75 (Ind. Ct. App. 2002), *reh'g denied*, *trans. denied*. We do not reweigh the evidence, and we consider conflicting evidence most favorable to the trial court's ruling. *Collins v. State*, 822 N.E.2d 214, 218 (Ind. Ct. App. 2005), *trans. denied*. We also consider uncontroverted evidence in the defendant's favor. *Id*. Riddle challenges the admission of the evidence regarding his possession of a firearm under both the Fourth Amendment to the United States Constitution and Article I, § 11 of the Indiana Constitution.

A. Fourth Amendment

Riddle contends that the pat down search violated his rights under the Fourth Amendment to the United States Constitution and urges that all evidence obtained as a result of the search should have been suppressed. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

As a general rule, the Fourth Amendment prohibits warrantless searches. *Black v. State*, 810 N.E.2d 713, 715 (Ind. 2004). However, there are exceptions to the warrant requirement. *Id*.

One such exception is a *Terry* stop, or the "investigatory stop and frisk." *Stalling v. State*, 713 N.E.2d 922, 923 (Ind. Ct. App. 1999). In *Terry v. Ohio*, the United States Supreme Court held that the police may, without a warrant or probable cause, briefly detain an individual for investigatory purposes if, based on specific and articulable facts, the officer has a reasonable suspicion that criminal activity "may be afoot." 392 U.S. 1, 30 (1968). More specifically, "limited investigatory seizures or stops on the street involving a brief question or two and a possible frisk for weapons can be justified by mere reasonable suspicion." *Overstreet v. State*, 724 N.E.2d 661, 663 (Ind. Ct. App. 2000), *reh'g denied*, *trans. denied*. In determining whether the police had reasonable suspicion to believe there was criminal activity afoot, we consider the totality of circumstances. *Carter v. State*, 692 N.E.2d 464, 467 (Ind. Ct. App. 1997).

Here, four factors leave us convinced that Officer Huddleston and Officer Dailey had reasonable suspicion justifying an investigatory stop. First, when Officer Huddleston encountered Riddle, he was on the premises of a gas station that was not open for business. Second, Riddle was not standing out in the open; rather, he was standing in a darkened car wash. Third, it was 3:15 a.m. Standing in a gas station's car wash bay would not be so suspicious if it took place in the middle of the day, during business hours. *See Luster v. State*, 578 N.E.2d 740, 743 (Ind. Ct. App. 1991) (noting that time of day is factor to be considered when measuring facts available to officer that lead him

"reasonably to conclude in light of his experience that criminal activity may be afoot." (quoting *Terry*, 392 U.S. at 30)). Fourth, according to Officer Huddleston, as soon as Riddle and Miller saw the police car, they exited the car wash and began to walk away. Such furtive behavior is a relevant consideration in determining whether criminal activity is afoot. *See Hailey v. State*, 521 N.E.2d 1318, 1319-20 (Ind. 1988) (defendant, after noticing that officer was watching him, changed direction and increased his speed); *Wilson v. State*, 670 N.E.2d 27, 29 (Ind. Ct. App. 1996) (defendant walked away from officers then ran when told to stop). These circumstances constitute "articulable facts which, together with the reasonable inferences arising therefrom, would permit an ordinary prudent person to believe that criminal activity has or was about to occur." *Sanchez v. State*, 803 N.E.2d 215, 220-21 (Ind. Ct. App. 2004) (citing *Terry*, 392 U.S. at 21-22), *trans. denied*.

As to the pat down search subsequent to the stop, we note the United States Supreme Court's pronouncement in *Terry* that

> there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.

392 U.S. at 25. Here, in addition to the facts justifying the initial stop, there is evidence that after Officer Huddleston first encountered Riddle, Riddle twice failed to obey Officer Huddleston's order that he keep his hands on the police car and eventually began looking over his shoulders. Officer Dailey's pat down search of Riddle was a reasonable officer

safety precaution. *See Hailey*, 521 N.E.2d at 1320 ("Once the stop had been accomplished and Officer Vogel learned the identity of the subject, the officer was justified in conducting a search of appellant for his own safety."); *Jones v. State*, 472 N.E.2d 1255, 1258 (Ind. 1985) ("The police may search a person prior to questioning to remove any weapons the person can use to harm the officer or effect an escape.").

Officer Huddleston's decisions to stop Riddle and to have Officer Dailey conduct a pat down search were both reasonable. The trial court did not violate Riddle's Fourth Amendment rights by admitting the evidence obtained as a result of the search.[4]

B. Article I, § 11

Riddle also makes a brief argument that the stop and search violated his rights under Article I, § 11 of the Indiana Constitution, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

[4] A *Terry* stop is one of three levels of police investigation, the others being a mere consensual encounter and an arrest or extended detention. *See Overstreet*, 724 N.E.2d at 663. A consensual encounter involves a casual and brief inquiry of a citizen and does not implicate the Fourth Amendment. *Id*. The State briefly contends that Riddle's Fourth Amendment argument is without merit because the encounter between Riddle and Officer Huddleston was consensual. Because we conclude that Officer Huddleston had reasonable suspicion to justify an investigatory stop, we need not address the question of consent. However, we do note that the encounter likely lost its consensual status as soon as Officer Huddleston asked Riddle to put his hands on the car. *See Florida v. Bostick*, 501 U.S. 429, 439 (1991) ("[T]he appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter.").

We also acknowledge Riddle's argument that this case is controlled by *Sanchez*, where a panel of this Court held that a consensual encounter "evolved into an investigatory stop which was not supported by reasonable suspicion." 803 N.E.2d at 221. In *Sanchez*, however, the Court stated, "At the moment of the stop, no articulable facts existed that would cause the Officers to believe that criminal activity was about to occur." *Id*. As discussed above, such facts did exist in this case, *e.g.*, it was 3:15 a.m., Riddle was standing with another man in the darkened bay of a car wash on the premises of a closed gas station, and he tried to leave the scene when he saw the police car.

Generally, in spite of the similarity in structure of the Fourth Amendment and Article I, § 11, interpretations and applications vary between them. *Holder v. State*, 847 N.E.2d 930, 935 (Ind. 2006). "The Indiana Constitution has unique vitality, even where its words parallel federal language." *Id*. The question under this provision is whether the officer's conduct "was reasonable in light of the totality of the circumstances." *Id*. at 940. In determining reasonableness, we balance: (1) the degree of concern, suspicion, or knowledge that a violation has occurred, (2) the degree of intrusion the method of the search or seizure imposes on the citizen's ordinary activities, and (3) the extent of law enforcement needs. *Id*. Here, two of the three factors militate in favor of the search. Namely, because Riddle was standing inside the bay of a closed car wash at 3:15 a.m. and walked away after seeing the police, the police were justifiably concerned that a violation had occurred. Second, these circumstances together with Riddle's refusal to keep his hands on the police car when ordered to do so implicate the law enforcement safety need. These two considerations outweigh the intrusion to Riddle. We conclude that in light of the totality of the circumstances, Riddle's rights were not violated under Article I, § 11 of the Indiana Constitution.

II. Sentencing

Riddle contends that under the Indiana Supreme Court's recent opinion in *Mills*, the trial court erred in enhancing his sentence under the general habitual offender statute by proof of the same felony used to establish that he is a serious violent felon. We agree.

In *Mills*, our Supreme Court held that "a defendant convicted of unlawful possession of a firearm by a serious violent felon may not have his or her sentence

enhanced under the general habitual offender statute by proof of the same felony used to establish that the defendant was a 'serious violent felon.'" 868 N.E.2d at 452 (citing *Conrad v. State*, 747 N.E.2d 575 (Ind. Ct. App. 2001), *trans. denied*). Here, one of the predicate offenses for the habitual offender count—the 2003 conviction for robbery as a Class C felony—was also used to establish that Riddle is a serious violent felon. *Compare* Appellant's App. p. 40 (habitual offender charging information) *with id*. at 20 (SVF charging information). Under *Mills*, this double enhancement was improper. We therefore remand this cause to the trial court with instructions to vacate the habitual offender sentence enhancement.[5]

Affirmed in part, vacated in part.

BAKER, C.J., and BAILEY, J., concur.

[5] Riddle also asserts that the trial court erred in relying on his prior burglary conviction both as an aggravating circumstance supporting the sentence for the underlying SVF conviction and to support the habitual offender finding and enhancement. Because we vacate Riddle's habitual offender sentence enhancement on the distinct grounds discussed above, we need not address this argument.